No. 296

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

PANHANDLE EASTERN PIPE LINE COMPANY, ILLINOIS NATURAL GAS COMPANY, AND MICHIGAN GAS TRANSMISSION CORPORATION,

Petitioners,

vs.

FEDERAL POWER COMMISSION, CITY OF DETROIT, MICH., COUNTY OF WAYNE, MICH., MICHIGAN CONSOLIDATED GAS COMPANY, AND MICHIGAN PUBLIC SERVICE COMMISSION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Motion of Petitioners for Enlargement of Time Under Rule 33 and Petition for Rehearing and for Enlargement of Scope of Review

THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners heretofore filed their petition for a writ of certiorari herein, presenting four separate questions. By its order of November 13, 1944, this honorable Court granted said petition, limited to the third question presented by the petition, namely, the following question:

> (3) Whether the Commission's action in treating petitioners' business as an entirety and refusing to make any allocation or separation with respect to petitioners' regulated and unregulated sales was beyond its statutory power.

The first and second questions presented by petitioners' said petition for writ of certiorari read as follows:

> (1) Whether the refusal of the Commission to receive evidence of reproduction or replacement cost and evidence of the value of petitioners' producing properties amounted to a denial of due process.
>
> (2) Whether limiting the sale price of petitioners' gas for resale so as to provide an over-all return of 6½ per cent on the depreciated cost of petitioners' properties including those devoted to production and gathering of natural gas and excluding petitioners' tendered evidence as to the market value of petitioners' gas leaseholds constituted an exercise of jurisdiction over production and gathering of natural gas in violation of the Natural Gas Act.

Heretofore, Canadian River Gas Company filed its petition for a writ of certiorari in cause number 380, October term, 1944, pending in this Court, presenting nine separate questions. By its order of November 13, 1944, this Court granted said petition of Canadian River Gas Company, limited to the eighth question presented thereby, which eighth question is as follows:

> Whether the Commission can, consistently with the Fifth Amendment to the Constitution of the United States and the provisions of the Act, reduce the rates and charges of Canadian on that part of its natural gas sales to Colorado interstate which is not sold by the latter for ultimate distribution to the public but is sold by it directly to its industrial customers; furthermore, independent of the above question, whether the Commission erred in making no separation or allocation as between Canadian's properties devoted to intrastate sales in Texas and its properties devoted to interstate sales, or as between the properties of Canadian and the properties of Colorado Interstate, and in using in lieu thereof a substitute method of allocation of cost of service which results in burden-

ing non-regulable gas with costs actually chargeable against regulable gas, in violation of the Fifth Amendment to the Constitution of the United States and the Act.

Thereafter, Canadian River Gas Company filed in said cause number 380 its petition "for rehearing and for enlargement of scope of review". Petitioners are advised that on December 21, 1944, this honorable Court granted said petition and that on January 2, 1945, a formal order will be entered, enlarging the scope of review in said cause number 380 to include, in addition to the aforesaid eighth question, the following questions:

1. Whether the Circuit Court, after correctly holding that the Commission has no rate regulatory jurisdiction over Canadian's production and gathering properties, facilities and business, erroneously concluded and ruled that the Commission in this case did not exercise such prohibited jurisdiction.

2. Whether, even assuming, arguendo, that the Commission has rate regulatory jurisdiction over Canadian's production and gathering properties, facilities and business, the Commission can, consistently with the Fifth Amendment to the Constitution of the United States, the requirements of the Act, and the decisions of this Court in the Natural Gas Pipeline, Hope and other cases, limit Canadian generally to a return only on the "wildcat", or original cost of its gas leaseholds to predecessor companies prior to discovery and development over 20 years ago, to the exclusion of all evidence of value, market or otherwise, the result of this procedure being, among other things, the inclusion in the Commission's rate base of a substantial block of Canadian's most valuable leaseholds at zero valuation and a still larger block of valuable leaseholds at only 10¢ per acre valuation.

Petitioners respectfully show that the aforesaid questions 1 and 2 which this honorable Court, by enlarging

the scope of review therein, has consented to review in cause No. 380, present the same fundamental issue presented by petitioners herein by their aforesaid questions 1 and 2 set forth at page two of their petition for certiorari herein. Petitioners further show that the factual background upon which Canadian River Gas Company presents its questions 1 and 2 is similar in all essential respects to the factual background upon which petitioners herein present their questions 1 and 2.

Wherefore, petitioners respectfully move the Court to enlarge the time provided under Rule 33 of the rules of this Court for filing their petition for rehearing herein; and, if said motion is granted, petitioners respectfully petition this Court to grant a rehearing to the extent that its order of November 13, 1944, denies review of questions 1 and 2 set forth in their petition for a writ of certiorari and to enlarge the scope of the review to be had in this Court so as to include the questions 1 and 2, in addition to the question 3, set forth in their said petition for a writ of certiorari.

ARGUMENT IN SUPPORT OF MOTION.

In support of their motion, petitioners respectfully show:

Petitioners did not file their petition for rehearing and enlargement of the scope of review within the time limited by Rule number 33 of the rules of this Court because it appeared that such action would be futile in view of the fact that there were pending before this honorable Court petitions for writs of certiorari in causes number 379, 380, and 575, October term, 1944, and on November 13, 1944, this honorable Court entered an order in each case restricting the review, as in petitioners' case, to the sole question of the propriety of the action of the Federal Power Commission in dealing with sales of gas not subject to its rate making powers. The refusal of this honorable Court to review any other question in any of these cases convinced petitioners that the limitation upon the review in their case was not based upon facts peculiar to their situation but represented a determination reached upon a consideration of the four cases as a group.

Considering the cases as a group, it would appear that, if the scope of review is enlarged to include an additional question, such question should be reviewed in each of the cases where it is presented. Furthermore, it would seem that this honorable Court would desire to hear full argument on the question and, if relief is granted in one case, to grant the same relief in another case where it is shown to be appropriate. As we will show hereinafter, the same considerations which would impel the granting of relief to Canadian River Gas Company are present, with equal force, here.

ARGUMENT IN SUPPORT OF PETITION.

The fundamental issue presented by Canadian River Gas Company in its questions 1 and 2 (quoted supra page 3) and by petitioners in their questions 1 and 2 (quoted supra page 2) is the same.

That issue is whether the Federal Power Commission can, consistently with the Natural Gas Act and Article Five of the Amendments to the Constitution of the United States, restrict that part of the earnings of a natural-gas company derived from its properties used in production and gathering of gas to 6½ per cent on the depreciated original cost of such properties.

In supporting the negative of this proposition, petitioners urged that the Federal Power Commission could effectively exercise its rate making powers over interstate sales for resale, without regulating production and gathering, by either (a) separating the properties used for production and gathering from the rate base and establishing a fair commodity price in the field, or (b) including the production and gathering properties in the rate base at their fair value measured by the present market value. (Pages 21-22, petition for certiorari herein.)

Canadian River Gas Company took the same position in its petition for rehearing and enlargement of the scope of review (see pages 12, 13-14 of said petition).

The similarity of the two cases is striking in the following respects:

1. Both companies have large and valuable gas leaseholds and producing and gathering facilities. For the year 1941 petitioners produced approximately one-half of the total amount of gas transported and sold by them (Exs. 56 and 57, R. IX, 4284, 4285).

2. Both companies acquired their gas leaseholds in the "wildcat" period of development at prices far below their present values and by arm's-length bargaining.

3. With respect to each company, the Federal Power Commission treated the production and gathering properties, which are not subject to regulation, in exactly the same manner that it treated the properties used for interstate transportation and sale for resale, which are subject to regulation.

A comparison of the argument presented by Canadian River Gas Company in its petition for rehearing and enlargement of the scope of review with the argument presented by petitioners in their petition for a writ of certiorari discloses no basic difference.

Canadian River Gas Company said at pages 11-12 of its aforesaid petition:

> We submit it approaches absurdity to state that the Commission does not have rate regulatory jurisdiction over production and gathering and at the same time to rule that rate regulatory jurisdiction is not exercised where the Commission includes production and gathering properties in a rate base; where it applies its own formula of original cost or prudent investment to production and gathering properties; where it includes production and gathering expenses in its estimate of future expenses; where it allows working capital for the production and gathering business, and considers and determines what wells are to be drilled in the future; and finally, where, in determining an alleged excess revenue, it applies a 6½% rate of return not only to the transmission system properties but also to the production and gathering properties which constitute approximately two-thirds of the total rate base as determined by the Commission. Obviously the Commission has treated every element of Canadian's production and gathering properties, facilities and business in precisely the same

manner as its interstate transmission properties, facilities and business, and has subjected every element of Canadian's production and gathering facilities to the same rate regulatory measures and procedures as Canadian's interstate transmission properties, facilities and business for the purpose of arriving at its ultimate conclusions with respect to rates and charges. If the Act had expressly delegated full and complete rate regulatory jurisdiction over Canadian's producing and gathering properties, facilities and business, the Commission could have done no more than it has done in this case. The Circuit Court's opinion is inconsistent and contradictory. Its effect, not only in the instant case but also in all other cases, if allowed to stand, is to vest complete rate regulatory jurisdiction over production and gathering and thus to assume and exercise a legislative veto power over an express and unambiguous Act of Congress.

Petitioners said at pages 21-23 of their petition for a writ of certiorari:

Section 1(b) of the Act expressly provides that the provisions of the Act shall not apply to the production or gathering of natural gas. It is petitioners' contention that it was the statutory duty of the Commission to segregate petitioners' production and gathering properties and the revenues and expenses related thereto. An alternative approach, which seems to lead to the same result was the contention that, while the operations might all be included within the petitioners' rate accounting structure, the rate base valuations of leases and other assets relating solely to production and gathering must be consistent with their status as unregulated properties. The Commission, however, not only failed to segregate the production and gathering phase of petitioners' business but it actually included in the rate base all of petitioners' production and gathering facilities and gas leaseholds at their original cost depreciated, depleted and amortized. These leaseholds were carried on petitioners' books at only $955,096, although petitioners

were prepared to show, and offered to prove, that these leaseholds had a market value on June 1, 1941, of nearly $8,500,000 (Ex. 39, R. 4199, 4201, 492). Thus, in total disregard of the Congressional mandate, the Commission arrogated unto itself jurisdiction over an unregulated portion of petitioners' property and business as fully and completely as it exercised jurisdiction over petitioners' transportation facilities and business, which latter facilities and resale business are within the ambit of the Commission's statutory authority.

The order of the Commission is peculiarly subject to attack in these proceedings because, as noted, the Commission excluded evidence which was admissible in reaching a determination with respect to the value of the commodity in the fields where produced. The decision of the court below in affirming the action of the Commission is in conflict with applicable decisions of this Court.

While the Natural Gas Act excludes the production and gathering of gas from the Commission's jurisdiction and permits it to exercise jurisdiction only over the interstate transportation of gas and over certain (not all) sales thereof in interstate commerce, the Commission has by its order herein found that petitioners are entitled to a price in the field for their gas, predicated solely on a consideration of the original cost of their leaseholds less accruals for depletion and the application thereto of a 6½% rate of return. This it has done notwithstanding the fact that production and gathering of gas are expressly excluded from the application of the provisions of the Natural Gas Act.

It is obvious that, if petitioners' leaseholds can now be sold for more than $8,000,000, an allowance of an earning on only a value of less than $1,000,000 is wholly erroneous and arbitrary. It is to be assumed that the market value of the leaseholds is largely reflected in the market price, or the value of the gas, in the respective areas where it is produced. Such market price or field value is determined by many economic

conditions and field transactions having no relation to the original cost of the leaseholds.

The Commission in reaching into and regulating this phase of the petitioners' business clearly went beyond the scope of its authority.

CONCLUSION.

For the foregoing reasons, petitioners respectfully submit that their motion and petition herein should be granted and that the scope of review upon writ of certiorari should be enlarged to include questions 1 and 2 presented by their petition for a writ of certiorari.

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Certificate of Counsel.

I, John S. L. Yost, being of counsel herein, do hereby certify that the foregoing motion for enlargement of time under Rule 33 and the foregoing petition for rehearing and for enlargement of the scope of review herein are presented in good faith and not for delay.

.....,

JOHN S. L. YOST,
Attorney for Petitioners.